STATUTES INVOLVED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 1247

BALTIMORE & OHIO CHICAGO TERMINAL RAILROAD COMPANY, a corporation,

Petitioner,

vs.

WILLIAM W. HOWARD,

Respondent.

ANSWER OF THE RESPONDENT TO THE PETITION FOR CERTIORARI

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The opinion of the Appellate Court of Illinois in this case is reported in 327 Ill. App. 83, 63 N. E. (2) 774, and appears in the record herein at pages 121 to 139.

STATEMENT.

Respondent's action is based upon the Employers' Liability Act (45 U. S. C. A. Secs. 51, 53) and Section 2 of the Safety Appliance Act (45 U. S. C. A. Sec. 2). Respondent, a switchman, was run over while attempting to open a knuckle on a standing freight car so that a moving car could be coupled to it. After several unsuccessful attempts to operate the pin lifter, he stepped with one foot between the rails and pulled upward on the pin lifter (which normally hangs down in a vertical position and when functioning properly opens the knuckle when pulled upward eight or ten inches to an angle of about 45 degrees) with his left hand, while pulling on the knuckle with his right. The pin lifter suddenly flew up to a position much higher than normal—three inches above horizontal—and respondent was thrown off balance and fell backward between the rails. Before he could regain his feet he was struck and run over by the approaching car which he was attempting to couple to the standing car (R. 122).

It was stipulated below that the parties were engaged in interstate commerce at the time of the accident and injury, and petitioner's violation of the Safety Appliance Act is conceded in this court. The sole question here involved is whether such violation (the use of a car with a defective coupler) was a proximate cause of respondent's injuries, petitioner contending that the necessary causal relation did not exist because the movement of the car which injured respondent was an intervening agency which became the proximate cause of the injuries.

SUMMARY OF ARGUMENT.

The defective coupler made it necessary for respondent to go between the cars to open the coupler so that the moving cars could be coupled onto the standing cars. The sudden yielding of the pin lifter which he was attempting to manipulate caused him to fall directly in front of the moving cars, which ran over and injured him. The use of the car with the defective coupler and the movement of the cars which injured respondent were parts of a single coupling operation, and such use and movement were directly related. The coupling operation could not be separated into its component parts in order to regard the car movement as an independent intervening cause of respondent's injuries. The violation of the Safety Appliance Act was the direct and proximate cause of his falling in front of and being run over by the moving cars.

ARGUMENT.

I.

The Employers' Liability Act and the Safety Appliance Act are in pari materia. An action arises under the Employers' Liability Act when the injury results in whole or in part from the employer's negligence, and a violation of the Safety Appliance Act is negligence within the meaning of the Liability Act.

Spokane and Inland E. R. R. v. *Campbell*, 241 U. S. 497.

San Antonio and A. P. Ry. Co. v. *Wagner*, 241 U. S. 476.

II.

The violation of the Safety Appliance Act need not be the sole cause in order that an action may lie; it is sufficient if it is one of the proximately contributing causes of the injury.

Spokane and Inland E. R. R. v. *Campbell*, 241 U. S. 497.

Minneapolis etc. Ry. v. *Goneau*, 269 U. S. 406.

Swinson v. *Chicago, St. P., M. and O. Ry.*, 294 U. S. 529.

Davis v. *Wolfe*, 263 U. S. 239.

III.

Petitioner's violation of the Safety Appliance Act was a proximate cause of respondent's injuries; the movement of the cars which injured him was not an independent intervening cause.

Chicago G. W. R. R. v. *Schendel*, 267 U. S. 287.
Grand Trunk Ry. Co. v. *Lindsay*, 233 U. S. 42.
Minneapolis etc. Ry. v. *Goneau*, 269 U. S. 406.
Swinson v. *Chicago, St. P., M. and O. Ry.*, 294 U. S. 529.
Davis v. *Wolfe*, 263 U. S. 239.
Atlantic City R. R. Co. v. *Parker*, 242 U. S. 56.
Tiller v. *Atlantic Coast Line*, 323 U. S. 574.
Tennant v. *Peoria and P. U. Ry. Co.*, 321 U. S. 29.
Anderson v. *B. and O. R. Co.*, 89 F. (2) 629 (C. C. A. 2), cert. den. 302 U. S. 696.
Eglsaer v. *Scandrett*, 151 F. (2) 562 (C. C. A. 7).
Chicago M. and St. P. Ry. Co. v. *Voelker*, 129 F. 522 (C. C. A. 8).
Erie R. Co. v. *Russell*, 183 F. 722 (C. C. A. 2).
Atchison, T. and S. F. Ry. Co. v. *Keddy*, 28 F. (2) 952 (C. C. A. 9), cert. den. 279 U. S. 856.
Philadelphia and R. Ry. Co. v. *Auchenbach*, 16 F. (2) 550 (C. C. A. 3).

In order to bring himself within the protection of the Safety Appliance Act, it is only necessary for respondent to show that his injury resulted in part from petitioner's violation of the Safety Appliance Act. It is clear that the violation caused him to go between the cars and to fall directly in front of the car which ran over him. Unless it can be said that this movement of cars was an intervening cause which broke the chain of causation between the

violation and the injury, respondent's right to recovery cannot be denied.

The movement cannot be regarded as independent of the use of the defective car, because respondent's attempt to manipulate the coupler was for the immediate purpose of enabling the moving cars to be coupled on. The use of the coupler and the movement were parts of a single operation, and it would be highly artificial to separate the component parts of this operation for the purpose of regarding the moving cars as an independent agency. A similar argument was rejected in *Chicago, M. and St. P. Ry. Co.* v. *Voelker,* 129 F. 522 (C. C. A. 8), in which it was urged that the preparation of a coupler for impact was to be regarded as distinct from the act of coupling; in *Erie R. Co.* v. *Russell,* 183 F. 722, in which it was contended that the movement of the cars which caught and injured the employee while he was adjusting a coupler was an intervening cause; and in *Atchison, Topeka and Santa Fe R. Co.* v. *Keddy,* 28 F. (2) 952, cert. den. 279 U. S. 856, where the employee was caught and crushed while adjusting a coupler and it was contended that the defective coupler was not the cause of the accident.

This court has held, in *Chicago G. W. R. R.* v. *Schendel,* 267 U. S. 287, that a brakeman's violation of the rules in failing to notify his engineer before going between cars was not an intervening cause of the injury; and in *Grand Trunk Ry. Co.* v. *Lindsay,* 233 U. S. 42, that a switchman's giving a come ahead signal to the engineer as he stepped between cars to manipulate a defective coupler, was at most an act of negligence concurring with defendant's violation of the Safety Appliance Act to produce the injury, and not the proximate cause of it so as to defeat a recovery under the act.

Even where the car movement causing the injury has no relation to the violation of the act it may not be an intervening cause. This is illustrated by *Anderson* v. *B. and O. R. Co.*, 89 F. (2) 629 (C. C. A. 2), cert. den. 302 U. S. 696, where a fireman was killed by an engine on an adjacent track while he was standing alongside his engine attempting to determine why its sanding apparatus was not functioning, and in an action for violation of the Boiler Inspection Act it was held that the question of proximate cause was for the jury.

The implication of petitioner's argument is that liability for violation of the Safety Appliance Act cannot arise unless the defective condition of the coupler itself causes the movement of the cars which is the final injuring force, as in *Minn. and St. Louis R. R. Co.* v. *Gotschall*, 244 U. S. 66, and *Louisville and Nashville R. R. Co.* v. *Layton*, 243 U. S. 617. If it were necessary that the coupler itself supply the immediate injuring force, recovery would have been denied in all cases in which the injury was immediately produced by the movement of cars, or, as in *Minneapolis etc. Ry.* v. *Goneau*, 269 U. S. 406, by contact with the ground.

It is difficult to conceive of a case in which the violation of the Safety Appliance Act was a more direct cause of the injury than it was in the instant case. The defective condition of the coupler made it necessary for respondent to go between the cars, and caused him to lose his balance and fall in front of the moving car, which immediately ran over him. It is of no significance that respondent was run over some six or seven feet from the end of the standing car (R. 124) rather than crushed against it. The injuring force was the same and caused the harm solely because the defective coupler placed him in its path. The move-

ment of the cars was at most a concurring proximate cause of the injuries. It made no difference whether this movement was negligent or not, since it was merely a concurring cause, and respondent was not required to, and did not, plead or attempt to prove that it was negligent.

Petitioner's argument, based on *Atchison, Topeka and S. F.* v. *Keddy,* 28 F. (2) 952 (C. C. A. 9), cert. den. 279 U. S. 856, seems to be that the car movement was a "disconnected cause" (Petition p. 13) because it was not alleged to be negligent and could not be assumed to be so. We think no argument is necessary to demonstrate that the question of negligence has nothing to do with causal relation. The car movement was no more or less an intervening cause if it was careful than if it was negligent.

Lang v. *New York Central R. Co.,* 255 U. S. 455, and *Great Northern Ry. Co.* v. *Wiles,* 240 U. S. 444, as well as other cases cited by petitioner, are not in point because in none of them was the employee injured while attempting to adjust a coupler for the purpose of making an immediate coupling.

The language of this court in *Minneapolis, etc. Ry. Co.* v. *Goneau,* 269 U. S. 406, in discussing the question of proximate cause, is applicable to the instant case. The court there said:

> "Since he was injured as a result of the defect in the coupler, while attempting to adjust it for the purpose of making an immediate coupling, the defective coupler was clearly a proximate cause of the accident as distinguished from a condition creating the situation in which it occurred."

In *Atlantic City R. R. Co.* v. *Parker,* 242 U. S. 56, a case in which the employee brought suit to recover for the loss of an arm crushed while he was coupling a tender to a car, the court said, at page 58:

> "If there was evidence that the railroad failed to furnish 'such couplers coupling automatically by impact' as the statute requires (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 18, 19), nothing else needs to be considered."

The violation is conceded in the instant case, the injury occurred while respondent was attempting to adjust the coupler for the purpose of making an immediate coupling, and we think nothing else needs to be considered.

No ground exists for issuance of the writ of certiorari in this case, and we respectfully submit that the petition should be denied.

Respectfully submitted,

JOSEPH D. RYAN,
Attorney for William W. Howard,
Respondent.